

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JILL STEIN , et al.	:	
Plaintiffs,	:	CIVIL ACTION
v.	:	
PEDRO A. CORTÉS, in his capacity as	:	
Secretary of the Commonwealth, et al.	:	NO. 16-6287
Defendants.	:	

**RESPONSE OF SECRETARY CORTÉS AND COMMISSIONER MARKS
TO THE MOTION TO INTERVENE**

Secretary Pedro A. Cortés and Commissioner of the Bureau of Commissions, Elections, and Legislation Jonathan Marks take no position on the proposed intervenors' motion for permissive intervention but do oppose their motion to intervene as of right and incorporate the attached brief in support of this response.

Respectfully submitted,

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BRIEF OF SECRETARY CORTÉS IN RESPONSE TO MOTION TO INTERVENE

Secretary Cortés and Commissioner of the Bureau of Commissions, Elections, and Legislation take no position on the proposed intervenors’ motion for permissive intervention but do oppose their motion to intervene as of right. As detailed below, the Secretary and Commissioner take issue with any suggestion that they will not adequately defend the challenged statute.

One factor that the intervenors must show to succeed for their motion to intervene as of right is that their interest is not adequately represented by the defendants. Fed.R.Civ.P. 24(a)(2). “The burden of establishing inadequacy of representation by existing parties varies with each case.” *Kleissler v. U.S. Forest Service*, 157 F.3d 964, 972 (3d Cir. 1998). Nevertheless, the burden always rests with “the applicant for intervention” who must ‘show that [its] interests are not adequately represented by the existing parties.’” *Brody v. Spang*, 957 F.2d 1108, 1123 (3d Cir. 1992) (quoting *Hoots v. Pennsylvania*, 672 F.2d 1133, 1135 (3d Cir. 1982) (internal quotation marks omitted)) (recently quoted in *Clean Earth, Inc. v. Endurance Am. Ins.*, No. CV 15-6111(FLW), 2016 WL 5422063, at *5 (D.N.J. Sep. 28, 2016). Intervenors correctly assert that “[t]he requirement of the Rule is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972) (citation omitted). Nonetheless,

“[w]here the applicant and the existing party have the same ultimate objective, intervention as of right may not be appropriate as a presumption arises that the applicant's interests are adequately represented.” *Clean Earth*, 2016 WL 5422063, at *5 (citing *In re Community Bank of N. Va. Guar. Nat'l Bank of Tallahassee Second Mortgage Loan Litig.*, 418 F.3d 277, 315 (3d Cir. 2005) (citation omitted).

Intervenors provide no basis to meet their burden of proof regarding their assertion of inadequate representation. “Typically, ‘[t]o overcome the presumption of adequate representation, the proposed intervenor must ordinarily demonstrate adversity of interest, collusion, or nonfeasance on the part of a party to the suit.’ *Clean Earth*, 2016 WL 5422063, at *5 (citing *In re Comty Bank*, 418 F.3d at 315). Here, the intervenors do nothing to establish divergent interests.

Therefore their motion for intervention as of right should be denied. The Secretary and Commissioner take no position on whether the intervenors’ motion for permissive intervention should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sue Ann Unger, Sr. Deputy Attorney General, hereby certify that on December 6, 2016, I caused to be served a true and correct copy of the foregoing Response to Motion to intervene via the method identified below:

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